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IN THE

Supreme Court of the United States

October Term, 1966

No. 482

STATE OF MARYLAND for the use of JOSEPHINE COSTAS, Individually, CAROL COSTAS, CARL COSTAS and JACKIE COSTAS, Infants, by JOSEPHINE COSTAS, their Mother and next friend, and JOSEPHINE COSTAS, as Administratrix of the Estate of EMANUEL J. COSTAS, deceased,

Petitioners,

—v.—

ATLANTIC AVIATION CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE

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No. .....

STATE OF MARYLAND for the use of JOSEPHINE COSTAS, Individually, CAROL COSTAS, CARL COSTAS and JACKIE COSTAS, Infants, by JOSEPHINE COSTAS, their Mother and next friend, and JOSEPHINE COSTAS, as Administratrix of the Estate of EMANUEL J. COSTAS, deceased,

Petitioners,

—v.—

ATLANTIC AVIATION CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Josephine Costas, individually, Carol Costas, Carl Costas and Jackie Costas, infants, by Josephine Costas, their mother and next friend, and Josephine Costas as Administratrix of the Estate of Emanuel J. Costas, deceased, petition for a writ of certiorari to review the judgments of the United States Court of Appeals for the Third Circuit entered in this action May 31, 1966.

Opinions Below

There were no opinions rendered by the District Court below. The *per curiam* opinion of the Court of Appeals below affirming the orders of the District Court by decision dated May 31, 1966 has not yet been reported. A copy of this decision is attached in the Appendix hereto at page 1a.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). The judgments of the Court of Appeals below sought to be reviewed was dated and entered on May 31, 1966.

Questions Presented

1. Was the conduct of the District Judge in staying plaintiffs' prosecution of an *in personam* death action (brought only a few months later) in a court of equal jurisdiction and refusing to hear plaintiffs' cross-motions for discontinuance or transfer, which was a "vital affirmative part of plaintiffs' total effort," * such as to constitute a departure from the accepted and usual course of judicial proceedings requiring the supervision of this Court, as well as constituting a violation of due process of law.

2. Was the *in personam* New Jersey action for wrongful death entitled to a priority as a matter of law over a similar *in personam* action pending in Brooklyn, by reason of it having been brought a few months earlier, and contrary to the decisions of this Court and to the decisions of other Courts of Appeal.

---

* As noted by the Court of Appeals below.

3. In granting to the defendant the extraordinary remedy of summarily enjoining the Brooklyn action, was the conduct of the District Court in New Jersey in refusing to simultaneously hear and dispose of plaintiffs' cross-motions to discontinue without prejudice or to transfer to Brooklyn, a departure from the accepted and usual course of judicial proceedings.

4. Was the summary denial of the plaintiffs' cross-motions upon a belated and meaningless argument thereof, two and a half months after granting the injunction, (a) an erroneous disregard of the preponderant equities of the plaintiffs and of the balance of convenience of the parties and witnesses, and (b) in conflict with the decisions of this Court, and with the decisions of other Courts of Appeal.

The Federal Rules of Civil Procedure Involved

Rule 41 of the Federal Rules of Civil Procedure provides in pertinent part:

"(a) Voluntary Dismissal: Effect Thereof

(2) *By Order of Court.* Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice."

Statement of the Case*

This is an action for wrongful death of the plaintiffs' decedent, Emanuel J. Costas, the owner and operator of a single-engine Beechcraft which crashed during attempted takeoff on May 30, 1963 near Elkton, Maryland. Emanuel J. Costas was killed, and Carol Costas, his infant daughter, and one of the passengers, was seriously injured. Two other passengers, Porzio and McCabe, also suffered personal injuries. Decedent was survived by his widow, Josephine Costas, and three minor children, Carol Costas, Carl Costas and Jackie Costas, plaintiffs herein (Appendix, 4a-6a).

The defendant, a Delaware corporation with main offices at Greater Wilmington Airport, Wilmington, Delaware, in the regular course of its business had previously inspected and repaired the aircraft and had otherwise undertaken to put it into an airworthy condition. It is alleged that the crash was caused by the negligence of the defendant in the performance of the foregoing. By reason of the fact that plaintiffs were unable to locate an office of the defendant in the State of New York, the within action was perforce instituted in the United States District Court, Newark, New Jersey, as the next closest jurisdiction (Appendix, 4a-5a).

A few months thereafter, after learning that the defendant could be served in the State of New York, a similar action was instituted in the United States District Court for the Eastern District of New York (Brooklyn), through service upon the Secretary of State at Albany, New York, with the intention of discontinuing the New Jersey action as soon as jurisdiction in Brooklyn could be assured (Ap-

* A more expanded statement of the case is contained in the record at pp. 2 to 14.

pendix, 25a). After obtaining a stipulation to an extension of time to answer in the Brooklyn action, the defendant, by order to show cause, in the District Court below obtained an interim stay of the Brooklyn action, and requested the New Jersey court to enjoin the New York action. Up to that time, the New Jersey action was in a preliminary posture (Appendix, 48a).

The plaintiffs attempted to obtain time to cross-move in the New Jersey action for leave to discontinue the same or to transfer the same to New York (Appendix, 28a). Upon the argument of the application for an injunction, the District Judge arbitrarily refused to hear the cross-motion simultaneously or to adjourn the injunction motion so that all of these issues could be heard together at a future date (Appendix, 2a and 28a).

The New Jersey District Court Judge on June 28, 1965, summarily granted defendant's motion from the bench and did not hand down a written opinion. In granting the injunction motion, the District Judge disregarded:

1. Plaintiffs' attempted cross-motions to discontinue without prejudice or transfer to Brooklyn, which were subsequently heard and denied several months later. (The Court of Appeals noted the cross-motions as "vital" to plaintiffs' position.)

2. The fact that these were not *in rem* actions.

3. That the balance of convenience of witnesses and parties and all of the equities were established to be in favor of the plaintiffs (Appendix 25a, 26a, 37-39a).

4. That there was only a few months difference in time between the actions, which were both in a preliminary posture of an involved and technical airplane crash case. There was no showing of prejudice to defendant.

5. That there were actions pending in the Supreme Court of the State of New York brought by the passengers Porzio and McCabe against the Emanuel Costas estate, and that a third party cross-claim against this defendant arising out of the same crash was also pending in the State Court. A third action was also pending by passengers Porzio and McCabe against this defendant, Atlantic Aviation. All of the New York actions have since been consolidated. All of the New York actions are being defended on behalf of Atlantic Aviation by the same attorney who is appearing in the New Jersey action (Appendix, 49a, 50a).

The following orders (there were no written opinions) of District Judge Robert Shaw were appealed to the Third Circuit:

1. An order of Judge Robert Shaw entered on July 6, 1965, after argument on June 28, 1965, granting from the bench defendant's application, enjoining plaintiffs from proceeding in the United States District Court for the Eastern District of New York (Appendix, 12a).

2. An order of Judge Robert Shaw finally entered October 4, 1965 after a pro forma argument and denial from the bench on September 13, 1965, denying plaintiffs' cross-motions for an order either granting a voluntary dismissal of the complaint without prejudice or transferring the action to the United States District Court for the Eastern District of New York in Brooklyn (Appendix, 33a).

The Opinion of the Court of Appeals Below

Although the Court of Appeals affirmed the orders of the District Court, implicit in its extremely short *per curiam* opinion is a recognition that there was an abuse of

the judicial process by the court below. When speaking of the appealability of the interlocutory order denying the cross-motions, it said:

> "In this instance, where they are not only ancillary to the interlocutory injunction but actually *a vital affirmative part of plaintiffs' total effort to have their case tried in the Eastern District of New York,* they are so reviewable because of the interlocutory injunction. National Equipment Rental, Ltd. v. Fowler, 287 F.2d 43, 45 (2 Cir. 1961)." (Emphasis supplied.)

REASONS FOR GRANTING THE WRIT

I.

The Court of Appeals below has sanctioned a departure from the accepted and usual course of judicial proceedings.

The record demonstrates the arbitrary conduct of the District Court in its disregard of elementary judicial process in failing to hear at the same time all of the issues involved in connection with defendant's application for an injunction even though those issues were "a vital affirmative part" of plaintiffs' presentation to the court. District Judge Shaw's treatment of the matter was not in accordance with accepted judicial procedure, and granting the extraordinary remedy of injunction solely on the basis of a few months priority was also directly contrary to the rule laid down by this Court in *Kline* v. *Burke Construction Co.,* 260 U. S. 226 (1923), in which it stated:

> "The rule, therefore, that the court first acquiring jurisdiction shall proceed without interference from a court of the other jurisdiction is a rule of right and of

law based upon necessity, and where the necessity, actual or potential, does not exist, the rule does not apply. Since that necessity does exist in actions *in rem* and does not exist in actions *in personam,* involving a question of personal liability only, the rule applies in the former but does not apply in the latter" (p. 235). (Emphasis supplied.)

On the other hand, if the District Court sought a reason for avoiding the application of the *Kline* rule upon weighing the relative equities of the parties, then it necessarily had to consider at the same time the "vital" cross-motions which were directly related to the issues, and which not only showed preponderant equities in favor of plaintiffs, but which made for an equitable and just solution.

Again, the District Court disregarded accepted judicial procedure when it finally and reluctantly, two and a half months later, permitted what amount to a pro forma argument of the cross-motion which it, of course, denied from the bench without opinion. The District Court, it is respectfully submitted, violated the clear statement of Rule 41(2), and the decisions interpreting the same, which hold that plaintiff is entitled to a discontinuance of the action upon payment of costs to be fixed by the court as long as there is no showing of substantial prejudice by the defendant. The District Court disregarded the decision of this Court in *Cone* v. *West Virginia Paper Co.,* 330 U. S. 212, 217 (1947). There, the court, discussing Rule 41, held:

"Traditionally, a plaintiff in such a dilemma had had an unqualified right, upon payment of costs, to take a non-suit in order to file a new action after further preparation, *unless the defendant would suffer some plain legal prejudice other than the mere prospect of a second lawsuit . . .* " (Emphasis supplied.)

II.

The Court of Appeals below has rendered a decision in conflict with the decision of this Court of Appeals on the same matter on the issue of priority, discontinuance and transfer.

The decision below on priority of action is not only in conflict with the decision of this Court in *Kline, supra,* but with *Mach-Tronics, Inc.* v. *Zirpoli,* 216 F. 2d 820, 888 (C. A. 9, 1963) and other cases cited herein; 1A Moore 2605.

In *Telechron* v. *Parissi,* 197 F. 2d 757, 762 (C. A. 2) the court stated:

> "The determination of priorities between pending cases on the basis of dates of filing is not to be applied in a mechanical way regardless of other consideration."

The decision below on the right to voluntary discontinuance is not only in conflict with the *Cone* case, *supra,* but also with *Home Owner's Loan Corp.* v. *Huffman,* 134 F. 2d 314, 317 (C. A. 8); *Ex Parte Skinner & Eddy Corp.,* 265 U. S. 86 (1924); 5 Moore Fed. Pr. 1053, 2d. Ed.

III.

The District Court's departure from the accepted and usual course of judicial proceeding, although in effect noted by the Court of Appeals, was, so far sanctioned by the Court below as to call for an exercise of this Court's supervision.

Very substantial rights of the plaintiff have been denied due process by the District Court; plaintiffs' right to proceed with the action in Brooklyn has been arbitrarily enjoined without a full and fair hearing. The Federal Rules

of Civil Procedure as to the right to discontinue an action have been ignored.

If a fair hearing before a court is important in a civil case, there is an implied admission in the decision of the Court of Appeals below that a fair hearing of all of the "vital" facts was not had before the injunction order was arbitrarily issued without a sustaining written opinion.

The exercise of this Court's supervision herein is particularly necessary in view of the fact that this action had been assigned to District Judge Robert Shaw for all purposes, including trial.

IV.

Plaintiffs are willing that if the orders below be reversed that the Brooklyn action be remanded to the State Court for consolidation with the other cases arising out of this accident so that one trial will dispose of all issues and cases arising out of this airplane crash.

Since this defendant is already in the State Court defending actions by passengers Porzio and McCabe and a third-party complaint by the Estate of Emanuel Costas, through the same attorney, it would be a saving of time and money to all concerned if there was one consolidated trial disposing of all of the issues arising out of this accident. This can be achieved by allowing discontinuance or transfer of the New Jersey action and by subsequently remanding the Brooklyn action to the State Court (by stipulation, if necessary).

If certiorari is granted herein, summary disposition by this Court is respectfully requested without the necessity of further briefs or arguments.

It is most respectfully submitted that the basic issues presented herein are relatively simple and may not require further expansion to this Court in the event the Writ of Certiorari is granted, in which event this Court may forthwith reverse the courts below. This is a procedure that this Court has on occasion followed in recent years.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

August, 1966.

THEODORE E. WOLCOTT
Attorney for Petitioners

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 15673 and 15676

STATE OF MARYLAND for the use of
JOSEPHINE COSTAS, *et al.*,

Plaintiffs-Appellants,

v.

ATLANTIC AVIATION CORPORATION,

Defendant-Appellee.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued May 20, 1966

Before Staley, *Chief Judge,* and McLaughlin and Smith, *Circuit Judges.*

Opinion of the Court

PER CURIAM: The first of these two appeals is from an injunction issued by the trial judge directing plaintiffs to abstain from all further proceedings in their identical suit in the Eastern District of New York. The second appeal is from the denial of plaintiffs' cross motions " * * * to transfer this action to the United States District Court for the

Eastern District of New York, and in the alternative, for an order pursuant to Rule 41(a)(2) of the Rules of Civil Procedure, for dismissal of this action, without prejudice, * * * * *." Ordinarily the interlocutory order denying those motions would not be reviewable. In this instance, where they are not only ancillary to the interlocutory injunction but actually a vital affirmative part of plaintiffs' total effort to have their case tried in the Eastern District of New York, they are so reviewable because of the interlocutory injunction. *National Equipment Rental, Ltd.* v. *Fowler*, 287 F. 2d 43, 45 (2 Cir. 1961).

The substance of these appeals has been exhaustively examined by this Court. On all of the facts we find that the decisions of the District Judge were well within his discretion.

The judgments of the District Court will be affirmed without costs to either party as against the other.

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No. 482

STATE OF MARYLAND, for the use of JOSEPHINE COSTAS, individually, CAROL COSTAS, CARL COSTAS and JACKIE COSTAS, infants, by JOSEPHINE COSTAS, their mother and next friend, and JOSEPHINE COSTAS as Administratrix of the estate of EMANUEL J. COSTAS, deceased,

Petitioners,

vs.

ATLANTIC AVIATION CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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Small v. Wageman, 291 F. 2d 734 (1st Cir. 1961) 6

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Texts Cited

IA Moore's Federal Practice (2d Ed.):

p. 2605 8

5 Moore's Federal Practice (2d Ed.):

pp. 1053, 1055 ..... 8, 9

Counter-Statement of Questions Presented

1. Did the Court of Appeals depart from the accepted and usual course of judicial proceedings when it affirmed *per curiam* the District Court's exercise of discretion in enjoining plaintiff from further proceeding with an action filed in the District Court for the Eastern District of New York which had been filed subsequent to the completion of substantial pretrial discovery proceedings and other related activity?
2. Did the Court of Appeals depart from the accepted and usual course of judicial proceedings when it affirmed the District Court's exercise of discretion in refusing to transfer or dismiss this action where it was shown that the District Court was the more convenient forum and that transfer or dismissal would result in substantial prejudice to defendant and the administration of justice?
3. Was the decision rendered by the Court of Appeals in conflict with any decision of this Court or any Court of Appeals?

Counter-Statement of the Case

On May 30, 1963, plaintiff's decedent was killed when an airplane he owned and piloted crashed on take-off near Elkton, Maryland (App. 5a).* Suit was commenced in the District of New Jersey on October 30, 1964 (App. 17a). Among other things, the Complaint alleges negligence on the part of defendant, which negligence allegedly caused the airplane to crash (App. 4a-11a). On the basis of the allegations of the Complaint, and the facts adduced through discovery, it is believed that the claim of negligence relates to an inspection and work defendant performed on the airplane some eight months prior to the crash. The inspection and work took place in defendant's facility at Teterboro Airport in Teterboro, New Jersey (App. 17a). After the Complaint was filed, extensive pretrial discovery proceedings were initiated. Defendant took the depositions of plaintiff, Josephine Costas, and plaintiff, Carol Costas who was allegedly injured in the crash (App. 20a). Both of these depositions were taken in New Jersey. Defendant undertook an inspection of relevant documents in the possession of plaintiffs (App. 19a). Further, defendant served extensive interrogatories on plaintiffs (App. 17a). The nature of the answers to interrogatories precipitated appearances in Court where the Court resolved numerous disputes relating to factual inquiries seeking to narrow the issues for the purpose of trial (App. 17a). Further pretrial activity is detailed in the Affidavit of Donald A. Robinson, particularly in paragraphs 5 and 6 (App. 20a and 21a).

In due course, the action was placed on the Pretrial Calendar and a Pretrial Conference was scheduled for April 30,

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* The reference of the abbreviation "App." is to the certified Appendix.

1965. At the Pretrial Conference counsel for plaintiffs stated that he required more time for discovery (App. 22a). Accordingly, the Court adjourned the pretrial conference to a date in July (App. 22a). At the same time, the Court, aware of the need of a widow and allegedly injured child for an early trial, attempted to commit counsel for plaintiffs to a Fall 1965 trial date (App. 22a).

Subsequently, the parties continued their pretrial activity. Defendant's counsel appeared in Court on May 24, 1965 on a motion to compel more specific answer to interrogatories (App. 22a). In the meantime, counsel for defendant learned that plaintiffs had filed an identical action against this defendant in the Eastern District of New York. This fact was never communicated to the Court by counsel for plaintiffs despite the fact that the action was commenced before the pretrial conference of April 30, 1965 (App. 22a).

Upon learning that an identical suit had been commenced in the Eastern District of New York, counsel for defendant moved by order to show cause to restrain plaintiffs from further proceeding with the action started in New York. A temporary restraint was entered on June 24, 1965 (App. 14a-16a), and on the return date of the Order to Show Cause, after oral argument and consideration of briefs, the Court entered an order permanently enjoining plaintiffs from further proceeding with the New York action (App. 12a-13a).

On the day after the Court entered its injunction order, plaintiffs filed a motion to transfer or in the alternative to dismiss (App. 1a). This motion was not before the Court at the time the injunction order was entered, and, of course, could not be heard by the Court on that date. The motion was heard on September 15, 1965 (App. 20a). Plaintiffs' counsel submitted two affidavits in support of the

Motion (App. 36a-40a, 46a-52a). Neither of the affidavits presented any facts which the Court did not have before it when it entered the injunction order. The opposing affidavit of defendant's counsel, however, presented crucial facts directly related to the motion to dismiss or transfer. The affidavit showed that six employees of defendant who were noticed for deposition by plaintiffs were residents of New Jersey (App. 44a). Upon oral argument and consideration of all of the affidavits and memoranda of law, the Court entered an order denying plaintiffs' motion (App. 33a-34a).

Plaintiffs appealed from both orders entered by the District Court (App. 3a; App. 32a). After consideration of briefs and oral argument, the Court of Appeals affirmed *per curiam* the orders (App. 1a-2a). This Petition followed.

ARGUMENT

POINT I

The Court of Appeals has sanctioned no departure from the accepted and usual course of judicial proceedings.

Plaintiffs' argument that the District Court departed from the accepted and usual course of judicial proceedings relates to five alleged occurrences:

(1) the failure "to hear at the same time all of the issues involved in connection with defendant's application for an injunction";

(2) the failure to follow *Kline* v. *Burke*;

(3) the permitting "finally and reluctantly, two and a half months later," of "what amount [sic] to a pro forma argument of the cross-motion which it, of course, denied from the bench without opinion";

(4) the disregard of Rule 41(2); and

(5) the disregard of *Cone* v. *West Virginia Paper Co.*

Each of the alleged occurrences is hereafter separately discussed.

(1) The failure "to hear at the same time all of the issues involved in connection with defendant's application for an injunction".

At the time that the District Court decided to grant the application for an injunction, it had before it *no motion for transfer or to dismiss.* This fact is clearly evidenced in the Appendix (1a) where the docket entries show that the motions for transfer and dismissal were filed the day *after* the injunction order was filed. With no motions having been presented to the Court, it was certainly no departure from accepted practice to decline to hear the motions. In any event, the fact that the motions to transfer or dismiss were not before the Court is irrelevant. There is absolutely no question that the issue raised by all the motions was the same—where this action should be tried. The affidavit filed by plaintiffs to support the motions to transfer or dismiss was identical with their affidavit filed in opposition to the application for the injunction. (Compare App. 36a-40a with App. 24a-28a). The facts adduced were likewise the same except for facts defendant presented. (Ibid.) The arguments presented by plaintiffs differed not at all. (Ibid.). The reason for all of this is the issue was the same. If anything, plaintiffs tactic benefitted them (as was no doubt intended) because by filing their motions after the injunction

was entered, it gave them an opportunity to reargue the sole issue—where the action should be tried.

(2) The failure to follow *Kline* v. *Burke.*

The failure to follow *Kline* v. *Burke Construction Co.,* 260 U. S. 226 (1922), was not a departure from accepted practice because the *Kline* decision has no applicability to the facts of this case. It is clear in just the quoted portion of *Kline* (See Petition, herein, pp. 7-8), that the decision applies only to conflicts between the state and federal jurisdictions. *Kline* has no applicability to questions of priority between federal courts. It has been so held. See *Crosley Corporation* v. *Hazeltine Corporation,* 122 F. 2d 925 (3d Cir. 1941), c.d. 315 U. S. 813 (1941), reh. den. 315 U. S. 831 (1942); *Small* v. *Wageman,* 291 F. 2d 734 (1st Cir. 1961).

The rule that is applicable to the facts in this case is set forth in *Kerotest Mfg. Co.* v. *C-O Two Fire Equipment Co.,* 342 U. S. 180 (1952). In *Kerotest,* this Court held that the basic consideration is which jurisdiction can best serve the ends of justice by an expeditious and effective adjudication. *Kerotest* also establishes that the decision is one invoking the discretion of the trial court. Here, the trial court duly exercised its discretion. There is not even an allegation in the Petition that there was an abuse of discretion. The exercise of discretion was affirmed *per curiam* by the Court of Appeals. There was no error.

(3) The permitting "finally and reluctantly, two and a half months later", of "what amount [sic] to a pro forma argument of the cross-motion which it, of course, denied from the bench without opinion".

The implication is that the District Court acted in an improper manner. This is not the fact. There is not a bit of

evidence that any argument before the Court was "pro forma". In fact, the Court heard (albeit, for the second time) all of plaintiffs' arguments and considered plaintiffs' motion papers, affidavits and memorandum of law (App. 33a). The fact that the Court's decision was rendered from the bench and was not accompanied by a written opinion does not evidence a departure from accepted judicial procedure, nor does it evidence any prejudice to plaintiffs.

(4) The disregard of Rule 41(2).

There is nothing in the record, nor anything alleged by plaintiffs from which it could be inferred that the trial Court disregarded Rule 41 (a)(2). On the contrary, the Court acted in accordance with the Rule and determined in its discretion that a voluntary dismissal was not in order in this case. This determination was affirmed as a valid exercise of discretion by the Court of Appeals. Rule 41(a)(2) requires no more.

(5) The disregard of *Cone* v. *West Virginia Paper Co.*

There is no evidence that the District Court disregarded this Court's decision in *Cone* v. *West Virginia Pulp & Paper Co.*, 330 U. S. 212 (1947). Plaintiffs' quotation from *Cone* plainly indicates that the Court was at that point discussing the traditional (pre-Rule 41(a)(2)) understanding with respect to voluntary dismissals. The *Cone* decision stands as clear authority that the traditional view was changed with the adoption of Rule 41(a)(2) and that thereafter there was no right to a voluntary dismissal. This is the import of *Cone* as it has been interpreted by virtually every federal court in the land.

POINT II

The decision of the Court of Appeals is not in conflict with the decision of any other Court of Appeals.

As previously discussed, the decisions below did not conflict in any manner with this Court's decision in *Kline* v. *Burke, supra.* The decisions in *Mach-Tronics, Inc.* v. *Zirpoli,* 316 F. 2d 820 (9th Cir. 1963) and *Telechron, Inc.* v. *Parissi,* 197 F. 2d 757 (2d Cir. 1952) are based on the *Kline* rule. Since they, like *Kline,* involve conflicts between state and federal courts, they, too, are inapplicable here. Citation of Professor Moore's treatise is also misplaced. He says specificially that it is where there is concurrent jurisdiction between a *state* and *federal* court that an action may proceed concurrently. See IA *Moore's Federal Practice,* 2d ed., p. 2605.

Plaintiffs state that the decisions below are in conflict with *Home Owners' Loan Corp.* v. *Huffman,* 134 F. 2d 314 (8th Cir. 1943) and *Ex Parte Skinner & Eddy Corp.,* 265 U. S. 86 (1924). The argument is an extension of the argument that there are conflicts with the decision in *Cone* v. *West Virginia Pulp & Paper Co., supra.* In *Ex Parte Skinner, supra,* this Court merely applied the traditional pre-Rule 41(a)(2) doctrine. As heretofore stated, the *Cone* case recognized the change embodied in Rule 41(a)(2). In the *Huffman* case, *supra,* the Court said,

> "Under Rule 41 a plaintiff does not have an absolute right to dismiss . . . without prejudice after an answer has been served." 134 F. 2d at 318.

Professor Moore does not support plaintiffs' view of the law. Plaintiffs cite page 1053 of Volume 5 of Professor Moore's treatise in support of their argument. There is nothing on page 1053 to support plaintiffs. However, on page 1055, Professor Moore writes:

> "The granting of the motion is within the court's discretion, and not a matter of right." 5 *Moore's Federal Practice*, 2d ed., p. 1055.

The District Court exercised its discretion and the Court of Appeals affirmed the exercise of discretion. That decision was not in conflict with any recognized authority.

POINT III

There is nothing before this Court which would call for an exercise of this Court's supervision.

Plaintiffs argue that they were not afforded a full and fair hearing by the District Court and state that there is an "implied admission" in the decision of the Court of Appeals "that a fair hearing of all of the 'vital' facts was not had" before the entry of the order enjoining further proceedings in the action pending in the Eastern District of New York. The "implied admission" apparently is contained in the following paragraph of the Court's opinion:

> "In this instance, where they are not only ancillulary to the interlocutory injunction but actually a vital affirmative part of plaintiffs' total effort to have their case tried in the Eastern District of New York, they are so reviewable because of the interlocutory injunction. National Equipment Rental, Ltd., v. Fowler, 287 F. 2d 43, 45 (2 Cir. 1961)."

The Court was there discussing the appealability of the interlocutory order denying the cross-motion. It is absurd to think that the Court intended to imply that plaintiffs were denied a full and fair hearing before the District Court. That the plaintiffs were afforded a hearing on the injunction motion is undisputed and is a matter of record (App.

12a). No facts other than those before the Court at that time were ever presented by plaintiffs and they do not here specify any "vital fact" they were prevented from placing before the Court. While the cross-motion may have been a vital part of plaintiffs' efforts to have this case tried in New York instead of in Newark, New Jersey, it is undisputable that every fact which plaintiffs relied upon to support their efforts was before the District Court both at the time it decided to issue the injunction and at the time it denied the cross-motion for transfer or voluntary dismissal. Plaintiffs received a full and fair hearing—twice. The Court of Appeals (with all of the facts before it) affirmed. There is no call for the exercise of this Court's supervision in this case.

CONCLUSION

After full and fair hearings, the District Court exercised its discretion in granting an Order enjoining an identical but later-filed action in another District Court, and denying a cross-motion to transfer or dismiss. The affirmance by the Court of Appeals did not sanction any departure from the accepted and usual course of judicial proceedings nor did its decision conflict with a decision of this Court or any other Court.

Respectfully submitted,

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